United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1043

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 75 - 1043

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

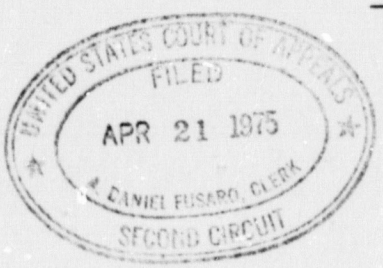
against

JOSEPH CALA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT



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QUESTIONS PRESENTED

1. Was the Defendant's acquittal for possession of the same counterfeit money in the Central District of California (Appendix 1) a bar to his trial for conspiracy to transfer and the substantive charge of transferring in the Western District of New York?

2. Was the Defendant afforded the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate?

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction of the United States District Court for the Western District of New York (MacMahon, District Judge of the Southern District of New York, sitting by designation), entered January 9, 1975, convicting the Defendant of conspiracy to commit offenses against the United States, by transferring and delivering certain counterfeit obligations, with the intent that the same be used as true and genuine Federal Reserve Notes, in violation of 18 U.S.C. §371. A notice of appeal to this Court was filed January 9, 1975.

STATEMENT OF FACTS

On August 9, 1972, the Defendant was arrested in the Central District of California and charged with possessing certain counterfeit Federal Reserve Notes, in violation of 18 U.S.C. §472. A Grand Jury in the Central District of California indicted him on that charge on November 15, 1972. Trial was held before United States District Judge Crary on January 2-3, 1973, whereupon a jury verdict of not guilty was entered.

On September 5, 1973, a Grand Jury in the Western District of New York indicted the Defendant for events occurring in July and August of 1972, allegedly in the Western District of New York, and the State of California, charging Defendant, along with an un-indicted co-conspirator, with the offense of transfer of the very same counterfeit obligations, as well as conspiracy to transfer the same.

The Defendant testified in the California trial in his own defense, to the effect that he had received the counterfeit obligations without ever asking for them from anyone, defending on the basis that he had been set up, or made a dupe.

The alleged co-conspirator, one James A. Gambacorta, testified in the New York trial to various conversations had with the Defendant, as well as the actual transfer of the counterfeit money on or about July 15, 1972, and various telephone conversations from California by the Defendant thereafter. The Defendant failed to take the stand in the instant case.

POINT I

THERE ARE VARIOUS GROSS ERRORS WHICH WERE MADE BELOW AFFECTING SUBSTANTIAL RIGHTS, WHICH CAN BE DEALT WITH BY THIS COURT.

Rule 52(b) of the Federal Rules of Criminal Procedure, the so-called plain error rule, requires the Court to take cognizance of many errors committed below, even though they have not been preserved for appeal. This Court must, in justice, exercise its discretion " . . . if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. . . ." United States v. Atkinson, 297 U.S. 157, 160 (1936). Such errors can be reviewed even where there was a failure to make objection or where an objection was made on the wrong ground. See United States v. Indiviglio, 252 F.2d 276 (2d Cir. 1965), cert.den. 383 U.S. 907 (1966); United States v. O'Connor, 237 F.2d 466 (2d Cir. 1956).

POINT II

THE VERDICT OF ACQUITTAL IN THE CALIFORNIA CASE WAS A TOTAL BAR TO THE INDICTMENT IN THIS CASE.

Concededly, the defense of collateral estoppel should have been raised in a Rule 12(b) motion prior to trial; but, the Trial Justice observed, "I think this point should have been raised before trial by the United States attorney, if not by the defendant." (Transcript, page 52, line 15) Certainly, on this important issue, the plain error rule should be applied.

The government's view of the facts in the instant case starts with various conversations as between Gambacorta and the Defendant in June of 1972, culminating with the transfer of approximately $200,000.00 worth of counterfeit currency to the Defendant in Buffalo, New York. Thereafter, the Defendant removed the currency to California and continued the long-distance conspiracy through the vehicle of telephone calls, both before and after his arrest on August 9th for possession of the very same currency in California.

The government, by placing the Defendant on trial

in California, for the possession of the bills, produced a general jury verdict of innocence; innocence in that Joseph Cala had no intent to possess said bills at that time with a view to defraud the government. Had the government re-indicted this Defendant in California for conspiracy to possess, based upon the overt acts alleged in this Indictment, or even the crime of transfer of said bills, there would be no doubt but that the general finding of not guilty as to the question of intent would be a bar to that second prosecution, on the grounds of double jeopardy.

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' "
> Ashe v. Swenson, 397 U.S. 436, 444 (1970) [Citation omitted]

In this hypothetical case of a second indictment in California, a Court would have no alternative but to bar the second prosecution, as the government would have had its one bite at the apple on the question of intent to defraud. See also, United States v. Kramer, 289 F.2d 909 (2d Cir.1961) where the first trial on the substantive charges of burglary

of Post Offices foreclosed a second trial on the theory of conspiracy to burglarize Post Offices. See also, Harris v. Washington, 404 U.S. 55 (1971) (Triple death- first indictment as to one death resulted in acquittal, further trials barred by collateral estoppel).

Transposing this hypothetical situation to the facts of the case at bar, a second Indictment in New York does not change anything. The fact is, this criminal conspiracy, if it existed at all, was effectively found not to so exist by the verdict of acquittal in the California case. Just as the Supreme Court in Ashe v. Swenson prohibited the second trial of robbery against the second victim of said robbery, the government is estopped from re-trying this Defendant on any issue relating to the same counterfeit money, whether it be possession, sale, distribution or any other theory, in any other jurisdiction. The point is, the entire matter arises out of one criminal episode.

The case of United States v. McCall, 489 F.2d 359 (2d Cir.1973) is not applicable, as that case dealt with two separate and distinct, different, conspiracies, New York - Buffalo, and New York - New Orleans. The case at bar dealt with a conspiracy surrounding the very same counterfeit money. Certainly the Court would not sustain

convictions for possession of said money in New York, Ohio, Indiana, Illinois, and every other state out to California. Why then, is there any question where the government seeks to change its theory of the action?

It is submitted that this Court, in the United States v. Mallah, 503 F.2d 971 (2d Cir. 1974) could have altered the so-called "same offense" test when applying principles of double jeopardy to cases before it. However, Mallah does make the concession that such tests should be tempered with the "policy of fairness" standard. U.S. v. Mallah, supra, 503 F.2d at 985, footnote 7).

The better view, it seems to this writer, is that espoused in Sealfon v. United States, 332 U.S. 575 (1948). That case was the reverse of this, in that in the first trial, a verdict of acquittal was made in the conspiracy case. The second Indictment, charging the substantive offense of uttering false invoices concerning rationed sugar, was barred on the principle of res judicata. The Supreme Court conceded that there were various discrepancies and differences in the evidence at both trials, but concluded:

> "There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only made

> it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existant. This the prosecution may not do." Sealfon v. U.S., 332 U.S. at 580.

In the case at bar, had the government tried the New York case first, would there be any doubt that it would not pursue the California case? Does it make any difference? I think not.

It is submitted that the jury finding in California, as to the counterfeit money in question, has forever removed from any other jury the question of intent to defraud.

> "Though former jeopardy by trial for the substantive crimes is not available as a defense against this perjury indictment, it could be that the acquittal on the substantive charge would operate 'to conclude those matters in issue which the verdict determined though the offenses be different.' " United States v. Williams, 341 U.S. 58, 63 (1951) [Citing Sealfon v. U.S., supra]

As United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974) was a perjury case arising out of a former trial, the discussion in said case concerning collateral estoppel

ng statement is adopted by this

le governing this matter:

ant in a criminal case
icted on the basis of
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d in the defendant's
or criminal proceeding
same parties."
v. Tramunti, 500 F.2d

parties, this is the same conspiracy,
and the question of ultimate fact,
defraud, has been determined in
minal adjudication. He should not
for the same criminal intent.

POINT III

HAS BEEN DENIED THE RIGHT
SSISTANCE OF COUNSEL.

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he has a heavy burden indeed.
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Bruce v. United States, 379 F.

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in original]

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equipped to go forward with th
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It has been said that it
as a "farce or mockery."
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Whether gross incompetence
ubstantial defense."
2d 113, 116-7 (D.C.Cir.1967).

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DeCoster, 487 F.2d
Cir.1973) [Italics

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on direct appeal, such as
lateral attack on State Court
corpus or otherwise.

ranscript in this case, makes
et, trial counsel was ill-
his case. A mere thirty-four
pages 2 - 3), consuming one
was the opening remarks of

defense counsel.

Within that opening, a crucial error, very detrimental to the interests of defendant, was made:

> "Second, if there was any wrong-doing, who was the instigator, who set the evil forces in motion?"
> (Appendix, 3)

From this, the jury must believe that the defendant is part of the so-called "evil forces."

Defense counsel, while listening to the chief prosecution witness, the co-conspirator James A. Gambacorta, allowed the government to question him on a passing of counterfeit currency in January of 1973, long after the dates in the Indictment as limited by the Bill of Particulars. (Appendix - 4) This sort of testimony was entirely irrelevant to the case at issue, and highly prejudicial to the defendant.

Defense counsel's unfamiliarity with the proper procedure to be used to impeach a witness based upon a prior written statement or testimony is demonstrated by counsel's remark, "Will you read this statement to the jury, please?" (Appendix - 5).

Counsel then proceeds to reinforce the prosecution contention that the witness has previously stated that he gave the counterfeit money to Joseph Cala, the defendant. (Appendix - 6).

Counsel persists at a further point in his mistaken impression that a statement can be read to the jury, rather than using it in the proper way to impeach the witness. (Appendix - 7, line 16).

The cross-examination continues with the witness establishing that the overt acts concerning telephone conversations, in fact did occur. Not only that, but that the defendant was alleged to discuss the merits of the paper used in the counterfeit currency, which establishes an important element in the government's case. (Appendix - 8, lines 7-13).

As the trial proceeds, the defense counsel asks the Court to see the record of conviction of the witness. (A-9) Why defense counsel assumed the Court might have such a document is beyond the comprehension of this writer. It is illustrative of the fact that the attorney did not have a firm knowledge of the record-keeping responsibilities in the District Court. Compare a similar situation arising

in United States v. Burks, 470 F.2d 432 (D.C.Cir.1972), a case in which the defense counsel also displayed a shallow knowledge of similar areas. That Court concluded:

> "The record in this case leaves a substantial doubt as to whether defense counsel, no matter how conscientious his efforts, satisfied the Constitutional requirement of an advocate with sufficient 'skill and knowledge adequately to prepare [a] defense' to any criminal charge, to say nothing of the charge in this case - murder."
> United States v. Burks, supra, 470 F.2d at 441.

Questions are next asked concerning the witness's knowledge of the penalties for certain crimes concerning the matter at issue, counsel evidencing a lack of knowledge of the penalty for the very crime which he is defending, conspiracy in violation of 18 U.S.C. §371. He mis-states the penalty as ten years, rather than the correct five years. (Appendix - 10, line 20).

As the cross-examination draws to a close, counsel in his questioning elicits a response that his client has previously been arrested, tried and acquitted in California for a similar offense. (Appendix - 11). Further conversations are elicited between the witness and the defendant. Knowing all this, and knowing further that the defendant

will not take the stand in his own defense, defense counsel plunges headlong into the abyss. He requests the Court to take judicial notice of the docket entries in the California case, and offers it into evidence, for the ostensible purpose of cross-examining the witness on said item. The witness has already given that evidence. What possible purpose could be served by belaboring the point? (Appendix - 11).

Finally, the Court removes the jury, (Appendix 12) and the Court and counsel discuss the merits of the double jeopardy defense, which defense was never raised prior to trial, apparently due to the fact, as counsel claims, he was not aware of it.

The following colloquy then ensues:

"The Court: You have the indictment in California. When was that returned?

Mr. Perla: I never saw this one.

The Court: Didn't you talk to your client?

Mr. Perla: No. I only saw my client yesterday. He is from California. He brought this with him yesterday, your Honor. I was advised --"

(Appendix - 13)

It goes without saying that "when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel."

United States v. DeCoster, 487 F.2d 1197, 1201 (D.C.Cir. 1973). This is unpreparedness at the zenith. Counsel then apologizes to the Court, stating that he met him for the first time yesterday. (Appendix 14, lines 18-22).

The Court even observes counsel's unpreparedness:

> "It is a very technical point of law, and you obviously haven't done any research on it, you haven't written any brief on it. I'm not up here to hear a lot of hot air."
> (Appendix 14, line 6 - 10)

The reason for counsel's headlong dash into this area is apparent from a statement he makes to the Court:

> "Double jeopardy. I had to bring out the man was tried."
> (Appendix 13, lines 1 and 2)

Counsel mistakes the principle involved, not knowing that it must be raised in a pre-trial motion, that it is a bar to trial, thinking that in some way he must bring it out as evidence before the jury in the trial.

> "[I]ncompetence can be made out by showing an ignorance of critical doctrine discoverable with rudimentary preparation . . ."
> Bruce v. United States, 379 F.2d 113, 117 (D.C. Cir.1967)

The last question on cross-examination shows the utter desperation of counsel, in asking a question to which he could not possibly know the answer, and which could be horribly damaging to his case. He asks whether the defendant ever told the witness that he passed any of the money sent to him in California. Luckily, the witness answers no. (Appendix 15, lines 12 through 14)

In the testimony of the witness, Robert Pochopin (Transcript 63 through 65) references are made to delivery of money in January of 1973, long beyond the time mentioned in the Indictment. No objection was ever made to such testimony.

The government examines the Secret Service agent, James J. Delamore, staying away from the prior trial, but defense counsel again discusses these matters with the witness. (Transcript 75 through 78)

When the government rests, counsel has to be reminded to make a motion on the ground that the government has failed to prove a prima facie case. (Transcript 80, line 8 through 11) In his summation, he makes reference to facts not in evidence, choosing to keep the defendant from the stand. For example, See Appendix 16).

Counsel is again reminded to make the appropriate motions after the verdict is returned. (Appendix 17).

From an entire reading of the record, it is apparent that trial counsel was singularly unprepared, was unfamiliar with standard rules of cross-examination, failed to perceive an important defense, failed to perceive the proper procedure within which to make that defense known, based his defense on facts which he never developed through testimony and, when confronted with a Judge who was distressed over the developments, made apologies and fawned upon the Judge in seeking his favor. In this case, as well as any other case, ". . . a defendant is not lightly to be penalized for the lack of assiduousness on the part of counsel upon whom he relies." United States v. Sanchez, 483 F.2d 1052 (2d Cir. 1973) cert.den. 415 U.S. 991. The Defendant, Joseph Cala, relied upon his trial counsel but did not receive the vigorous advocacy to which he was entitled.

> "Assistance of counsel includes consultation and understanding of the accused's case before trial, a consideration of his special interests in cross-examination of witnesses and production of defense's evidence and in the making of argument, and otherwise."
> Collingsworth v. Mayo, 173 F.2d 695, 697 (5th Cir.1949). See, generally, Bazelon. The Defective Assistance of Counsel, 42 U.Cinn.L.Rev.1 (1973)

C O N C L U S I O N

The Judgment of conviction, previously entered herein should be reversed and the defendant discharged, or, in the alternative, this matter should be remanded for a hearing as to the ineffectiveness of trial counsel. United States v. DeCoster, 487 F.2d 1197 (1973)

Respectfully submitted,

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APPENDIX

CONTENTS

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

September 1972 Grand Jury

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

JOSEPH JAMES CALA,)

Defendant.)

The Grand Jury charges:

[18 U.S.C. §472]

On or about August 9, 1972, in Los Angeles County, within the Central District of California, defendant JOSEPH JAMES CALA with intent to defraud had in his possession and custody approximately $181,750 in counterfeit $10 Federal Reserve Notes, forged and counterfeited obligations and securities of the United States, as the defendant then and there well knew.

A TRUE BILL

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Forman

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WILLIAM D. KELLER
United States Attorney

currency, it is not a genuine obligation of the United States. He will tell you the reasons for his opinion, as to why that is counterfeit and not genuine money.

That, ladies and gentlemen, is, without getting into any of the frills, the nuts and bolts of the Government's case, and that is what the Government intends to prove upon this trial, and that is the testimony that you will hear today. Thank you.

THE COURT: Mr. Perla?

MR. PERLA: Yes, sir. Ladies and Gentlemen of the Jury: Joseph Cala is being tried for a crime involving counterfeit money. As the Court will charge you, this is just an indictment, nothing more than just a means of commencing the proceedings. It is not evidence of any evidence, no proof.

I am asking that you keep an open mind until all the evidence is in, and don't make any decision until the final case has been heard. Then I'm asking

that you pay attention to the sole accuser, Mr. James Gambacorta, and I'm asking then that while he is testifying that you not only judge Mr. Cala, who is the defendant, but also judge the man who is testifying, the accuser, and say to yourself, 'Is this a man I'm going to believe?' The type of man he is.

During the course of the trial I only ask that you listen carefully to the accuser, and then judge what he is guilty of. I ask you then to ask yourselves these questions as you are listening to Mr. Gambacorta. First, who was the real culprit here, the real wrongdoer? Second, if there was any wrongdoing, who was the instigator, who set the evil forces in motion? Lastly, what is he gaining from this testimony, why is he testifying? And then to yourself, 'Do I believe this man?'

Ladies and gentlemen, all I ask is that if his testimony fails, then the whole case should fail. Thank you very much.

Company.

Q. That appears to be a xerox copy?

A. Yes, a copy of the phone bill.

Q. Did you at any time get an original bill from the company?

A. Yes, I did.

Q. All right. And did you ever compare that with this?

A. Have I compared which? My original with this, no I haven't.

Q. All right. Do you have the original in your possession?

A. Yes, I do, it's in my files.

Q. Does this appear to be a copy of the original?

A. Yes, it does. Definitely, yes. Got my number on there, it's got all the phones listed, my business phones, my other phone calls is on there.

Q. All right. Now, Mr. Gambacorta, directing your attention to January 11, 1973, did you pass any counterfeit currency on that date?

A. Did I pass any?

Q. Yes.

A. No, I didn't.

Q. Did you transfer any?

A. On January 11th?

Q. Of 1973.

did you make a sworn statement out to Special Agent Earl Devaney?

A. Yes, I did.

Q. Is that the sworn statement?

A. Yes, it is.

Q. Is that your signature?

A. Yes, it is.

Q. January 12, 1972?

A. That's right.

Q. '73?

A. Right.

Q. You say in that statement that "In the latter part of April, early May, I met a man known to me as Eddie Barczak --

A. Yes.

Q. -- at the Your Host Restaurant."

A. Yes.

Q. Will you read this statement to the jury, please?

MR. WILLIAMS: Your Honor -- excuse me, your Honor, I think the proper procedure would be for Mr. Perla to ask a question.

THE COURT: Yes, sustained.

BY MR. PERLA:

Q. Okay. Did you state in your statement that you met an Eddie Barczak at the Your Host Restaurant in early

May or April?

A. Yes, I did.

Q. Okay. And you said at that time that he had with him a brown suitcase which contained over $200,000?

A. That's right.

Q. Did you say in your statement that he also had plates with ten dollar bill impressions on them?

A. Yes.

Q. Several counterfeit fifty dollar bills?

A. Yes, I did.

Q. And did you say in your statement that he told you to try and sell the whole suitcase?

A. That's right.

Q. Okay. And you told him you would try, and he left the suitcase with you, okay?

A. Yes.

Q. You also say in that statement that you gave $198,000 of this counterfeit money to a man known to you as Joseph Cala?

A. Yes.

Q. You also gave an individual known as Charles Celetta approximately $500 worth?

A. That's right.

Q. And you also gave $900 worth to a man by the name of Bob?

very upset, I was arrested that evening and --

Q. Well, how many times have you given people $200,000 in your lifetime that you can't remember whether it was June, May, July or August?

A. Just the one time. There was no other time, sir.

Q. Would you say then you are off maybe by thirty days, from July 15th to the end of August?

A. At the time my mind wasn't quite clear after being arrested by the Secret Service agents and being taken in by --

Q. You have a tendency to lie, isn't that true?

A. No, I don't, sir.

Q. Okay. How much money was in that suitcase that you gave Mr. Cala?

A. As I said, approximately $200,000.

Q. I refer you to Page 12 and 13 of the grand jury testimony. Your Honor, should I have him read it or should I?

THE COURT: If you think it is inconsistent, read the questions and answers.

BY MR. PERLA:

Q. Okay. Was there a time -- this is asked by Mr. Flierl -- "Was there a time you gave him a suitcase? Yes. When was that? That was just when I saw him the last time before he left. He said he was going

A. No. The printing was good, I understand. I don't know too much about counterfeiting.

Q. Was the paper any good?

A. No, the paper is very bad, the paper is very bad.

Q. Isn't that true?

A. Yes.

Q. Did you discuss this with Mr. Cala?

A. Yes.

Q. Didn't he say the paper was bad?

A. Yes.

Q. He said you got to be crazy to pass this sort of stuff?

A. Yes, he did, certainly did.

Q. Did you try to pass any of this stuff?

A. No, I didn't.

Q. You didn't try to pass any of it?

A. No.

Q. Didn't you give some of it to Charlie Celetta?

A. I gave that to him, I didn't sell it to him.

Q. Did there come a time when you sold some to a Bob?

A. Yes.

Q. On January 12th?

A. Yes.

Q. You sold that one?

A. Yes.

he went back to New York.

Q. Sir, when were you indicted for this crime?

A. Indicted?

Q. Yes.

A. You mean when I was arrested?

Q. Yes.

A. January 11th of 1973.

Q. Did you go to trial?

A. No, I didn't.

Q. What were you charged with originally?

A. With conspiracy and possession and passing of counterfeit money.

Q. Let's -- first of all, were you charged with possession, sir?

A. I don't recall, sir.

Q. Isn't it true you had three counts against you?

A. I don't recall. To be honest, I don't recall.

MR. PERLA: Your Honor, may I see the original record that this man was originally charged with?

THE COURT: I suppose it is a public document, on file since about 1972.

MR. PERLA: May I have it?

MR. WILLIAMS: I don't have it.

BY MR. PERLA:

Q. On January 11, 1973 you were charged with a crime and you never went to trial?
A. No, I did not.
Q. Why didn't you go to trial?
A. I pleaded guilty. I was guilty, I pleaded guilty.
Q. You pleaded guilty to what?
A. To conspiracy.
Q. Was this after conversation with the federal attorney and the Secret Service?
A. Conversations, yes.
Q. And in those conversations did they tell you what you could have received if you were found guilty of possessing money, counterfeit money?
A. Yes.
Q. Did they tell you you could get fifteen years?
A. I don't recall what the exact amount of years was, I can't remember right now.
Q. Did they tell you you could get ten years for conspiracy?
A. I think he said five years for conspiracy.
Q. All right. What did they tell you you would receive if you took a plea?
A. Nothing, nothing at all. They didn't say anything.
Q. Okay. Page 3, "And have you agreed to cooperate with the Secret Service and the U.S. Attorney's

record that indicates that.

MR. PERLA: Your Honor, if I may have the Court take judicial notice -- I have here a -- judicial notice of a document, which I wish the Court to take judicial notice, which is labeled Criminal Docket, U.S. District Court, bearing the seal twice of the U.S. District Court of California, and also bearing the certification and attestation of the Clerk of the U.S. District Court, Central District of California. This document, your Honor, says -- it has entries --

THE COURT: Well, let me see if I will take judicial notice.

MR. PERLA: Yes, your Honor.

THE COURT: Well, it appears to be a docket sheet. I will take judicial notice of that.

MR. PERLA: May I cross examine on that, your Honor?

THE COURT: I don't know how you could possibly cross examine this witness on that. You can try.

MR. PERLA: Well, it states here, your Honor, if -- it's a docket sheet which has dispositions

of the case --

THE COURT: I have just read it, I know what it states.

MR. PERLA: All right. May I offer this in evidence?

THE COURT: Yes.

MR. PERLA: Now, may I make some motions?

THE COURT: Let's see whether it is coming in. I will take judicial notice of it.

MR. PERLA: If the Court wishes, may I make some motions outside of the purview of the jury?

THE COURT: All right. The jury may take a recess. I don't think that is the document you need. Do you have a copy of the indictment?

MR. PERLA: That's all I had, your Honor, that's all I could get.

THE COURT: Perhaps the United States Attorney has a copy of the California indictment, do you?

MR. WILLIAMS: I believe so.

THE COURT: The jury may take a recess.

(Jury exited the courtroom at 11:30 A.M.)

(Indictment referred to was marked Defendant's Exhibit 1 for identification.)

MR. PERLA: Double jeopardy. I had to bring out the man was tried.

THE COURT: You have the indictment in California. When was that returned?

MR. PERLA: I never saw this one.

THE COURT: Didn't you talk to your client?

MR. PERLA: No. I only saw my client yesterday. He is from California. He brought this with him yesterday, your Honor. I was advised --

THE COURT: Let me hear what you have to say about it, why isn't it double jeopardy?

MR. PERLA: Why isn't it? I'm sorry, your Honor.

MR. WILLIAMS: I think the crucial test, of course, as to whether double jeopardy attaches is whether or not the evidence on this particular charge is the same as the evidence on that charge. I think the facts would show that the evidence isn't the same. We are talking about two kind of crimes. Number one, the indictment out in California was a violation of Section 472, which charges possession of counterfeit. The testimony out there, your Honor, as I understand

the jury will relieve us of the problem. All right, get the jury back and let's get going.

MR. PERLA: Could I be heard a little more on the elements?

THE COURT: I will reserve decision on it. It is a very technical point of law, and you obviously haven't done any research on it, you haven't written any brief on it. I'm not up here to hear a lot of hot air. I will reserve decision and give you a chance to brief it if there is a conviction. I am not cutting you off, Mr. Perla. I want an intelligent argument on it with some research to back your points up. I will give you that opportunity if there is a need for it.

MR. PERLA: I want to apologize to the Court. I was notified of this case Friday. Mr. Cala -- I met him for the first time yesterday -- he brought me that. That is why, your Honor, I am caught unawares.

THE COURT: All right.

MR. PERLA: Am I precluded from mentioning that in

front of the jury? Not about the legal aspect, but the fact --

THE COURT: I don't preclude you from getting all the facts in.

MR. PERLA: All right, sir. Thank you.

THE COURT: All right, proceed.

J A M E S A. G A M B A C O R T A , called as a witness on behalf of the Government, and having been previously duly sworn, resumed and testified further as follows:

CROSS EXAMINATION BY MR. PERLA: (Cont'd.)

Q. Mr. Gambacorta, Mr. Cala never told you he passed that money, did he?

A. No, he did not.

MR. PERLA: I have no further questions from this witness, your Honor.

THE COURT: Any redirect?

MR. WILLIAMS: Thank you.

REDIRECT EXAMINATION BY MR. WILLIAMS:

Q. Mr. Gambacorta, with respect to your entry of your plea of guilty, did anyone make any promises to you about what the sentence would be or might be?

A. No, they did not, sir.

Q. All right. Now, do you recall testifying before the United States Grand Jury on August 6, 1973?

when Cala was here, he is now fabricating again. The truth of the matter is that he sent that money to California. Mr. Cala receives this money in California, and he doesn't know what to do with it, he started to burn it. Mr. Altonian testifies about this money, that jury hears this case, he is charged with possession with an intent to defraud, this was in California, he is found not guilty.

Now they take that same money and say, 'Well, we couldn't get you with the possession, with the intent to defraud, with intent to pass, now we are going to charge you with conspiring, that you talked about it.'

He is charged with 473, "Whoever buys, sells, exchanges, transfers, receives or delivers any false, forged, counterfeited or altered obligation or other security of the United States with the intent that the same be passed."

He is also charged with a violation of the conspiracy act, Section 371,

THE COURT: All right, fourteen days.

MR. WILLIAMS: May I have two days to respond?

THE COURT: Sure.

MR. PERLA: On the double jeopardy aspect.

THE COURT: On the double jeopardy, only on Count 1.

MR. PERLA: That is the conspiracy count.

THE COURT: On the conspiracy.

MR. PERLA: Yes, your Honor.

THE COURT: All right.

MR. PERLA: Thank you, your Honor.

THE COURT: Do you have any other motions? I think you should make some other motions at this time, to set aside the verdict as contrary to the law and the evidence.

MR. PERLA: At this time I wish the Court to set aside the verdict on the grounds it is contrary to the law, also contrary to the facts in the case. The people didn't prove the intent element of the case. There was a conspiracy but there was also an intent part of that. They dismissed on the possession but they still held him in the conspiracy. I feel it's a -- it doesn't make sense, your Honor. I think there is a variable there.

United States of America vs. A-18 **United States District Court** for

DEFENDANT: JOSEPH CALA — WESTERN DISTRICT OF NEW YORK

DOCKET NO. Cr-1973-299

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: January DAY: 9 YEAR: 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[x] WITH COUNSEL Samuel Perla, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~ verdict of [ ] NOT GUILTY. Defendant is discharged [x] GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to commit offenses against the United States, by transferring and delivering certain counterfeited obligations or other security of the United States, with the intent that the same be used as true and genuine Federal Reserve Notes, in violation of Section 371, Title 18, U.S.C. (Ct. 1)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

Defendant was found not guilty on Count Two.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE Jan. 30, 1975

BY _____ ( ) CLERK (X) DEPUTY

SIGNED BY

[x] U.S. District Judge

[ ] U.S. Magistrate

Lloyd F. MacMahon

LLOYD F. MacMAHON, U.S. District Judge

Date Jan. 30, 1975

25% COTTON FIBER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

- vs -

Docket No.75-1043

JOSEPH CALA,

Defendant-Appellant

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:
CITY OF BUFFALO)

DOREEN VALYEAR, being duly sworn, deposes and says; deponent is Secretary to DAVID GERALD JAY, attorney for Defendant-Appellant herein, deponent is not a party to the action, is over 18 years of age and resides at Kenmore, New York.

On April 18, 1975, Deponent served the within Brief and Appendix of Defendant-Appellant (two copies) upon Richard J. Arcara, United States Attorney (Attention of Roger Williams, Esq.) attorney for Plaintiff-Appellee in this action at the United States Court House, Court Street, Buffalo, New York, by depositing a true copy of same enclosed in a post-paid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Doreen Valyear
Doreen Valyear

Sworn to before me this
18th day of April, 1975.

Gladys M. Lintner

GLADYS M. LINTNER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976